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IN THE

Supreme Court of the United States

October Term, 1969
No. 1014

OWEN B. LAMPMAN and THRIFTIMART, INC., a corporation,

Petitioners,

vs.

UNITED STATES OF AMERICA, UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, and JESSE W. CURTIS, a Judge thereof,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petitioners,

vs.

UNITED STATES OF AMERICA, UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, and JESSE W. CURTIS, a Judge thereof,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States of America:

The Petition of Owen B. Lampman and Thriftimart, Inc., for Writ of Certiorari directed to the United States Court of Appeals for the Ninth Circuit to review the Judgment of that Court entered in these cases October 31, 1969 (see description below), and a Judgment denying Petition for Rehearing entered December 2, 1969, respectfully shows:

I.

Opinions Below.

The orders and opinions of the District Court and the Court of Appeals for the Ninth Circuit are attached

to this Petition as appendices in chronological order. A copy of the Order of the District Court denying petitioners' motion in the alternative to (1) postpone the return of the subpoena to enable petitioners to file a motion to quash, (2) summarily quash the subpoena and order the Government to move formally for a subpoena duces tecum, or (3) summarily quash the subpoena duces tecum is attached hereto as Appendix A, page 1. The interim Order of the Court of Appeals dated September 10, 1968, was not reported. It is attached as Appendix B, pages 2 to 7. The District Court Order (not reported) dated December 10, 1968, denying petitioners' motion to take depositions is attached as Appendix C, pages 8 to 10. The Order (not reported) of the District Court refusing to make a further record and denying motion to quash dated February 26, 1969, is attached as Appendix D, pages 11 to 13. The Final Judgment of the Court of Appeals for the Ninth Circuit (not yet reported) is attached as Appendix E, pages 14 to 17. The Judgment (not yet reported) denying petition for rehearing but correcting the Final Judgment of the Court of Appeals is attached as Appendix F, page 18.

II.

Jurisdiction.

The Judgment of the Court of Appeals was entered October 31, 1969, (Appendix E) and Order Denying Petition for Rehearing and correcting the Judgment of the Court of Appeals was entered December 2, 1969, (Appendix F). The jurisdiction of this Court is invoked under 28 USC 1254(1).

III.

Questions Presented.

1. Whether a corporate owner of records and papers in its possession and its subpoenaed officer are entitled to court review of an attempt by the Internal Revenue Service and the Department of Justice to search and seize such records and papers by a subpoena duces tecum where:

(a) the subpoena dueces tecum does not delimit the confines of the search by designating the needed documents nor on challenge does the Government establish or attempt to establish that the papers and records are relevant in purpose and specific in directive.

(b) the subpoena duces tecum purportedly requires an appearance before a grand jury, but in truth and in fact the subpoena duces tecum was (1) filled in by an agent in the field for the Department of Justice, (2) without the knowledge of any grand jury or the Court, and (3) the subpoena was so issued by the agent in the field in order to defeat and circumvent the limitations imposed by statute and the Constitution on administrative summons and subpoenas and thereby destroy the effect of this Court's determinations in *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727 (1967); *See v. City of Seattle*, 387 U.S. 541, 87 S.Ct. 1737 (1967); and other cases, and to defeat this Court's requirements on searches and seizures by warrant expressed in *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509 (1964), and other cases.

(c) where the subpoena duces tecum requires the delivery of the papers and records of the corporation to an illegally constituted grand jury so manipulated by the Government as to destroy the secrecy of the grand

jury, its protective function and the rules specifically limiting the persons who may be present or attend upon the grand jury.

(d) where the effect of the Order of the trial court refusing protection and the Order of the Court of Appeals refusing review is such that the result will be a final destruction of the constitutional rights and limitations of the corporation and its officer with respect to both the subpoena and a constitutionally constituted grand jury.

2. Whether the Department of Justice and the Internal Revenue Service are entitled to an unlawful search and seizure by subpoena duces tecum where they are forbidden such search and seizure by administrative summons or subpoena by reason of constitutional and statutory limitations; where no grand jury and no Court had knowledge of or authorized the subpoena search and seizure.

3. Whether searches and seizures should be forbidden where the stated and announced purpose is to deliver the papers searched and seized by subpoena duces tecum to special agents of the Internal Revenue Service in violation of the secrecy of the grand jury in order that such special agents may report to the grand jury only those things contained in the books and records which the special agents believe the grand jury ought to know.

4. Whether petitioners are entitled to a writ of mandate forbidding the abuse of the grand jury by the Department of Justice and the Internal Revenue Service where that abuse includes (a) a violation of the secrecy of the grand jury, (b) the admission of persons not included in Rule 6 before the grand jury, and (c) destroys the protective function of the grand jury.

IV.

A Similar Case Is Now Pending Before This Court.

On December 15, 1969, this Court granted certiorari in *United States of America v. Gifford-Hill-American, Inc., United Concrete Pipe Corporation and Lloyd R. Earl.* The petition for certiorari filed by the Solicitor General on behalf of the United States of America clearly raises constitutional questions concerning the secrecy of the grand jury and the basic function of the grand jury as well as questions concerning the right of review by mandate or appeal of orders made by the District Court dealing with the grand jury. In that case the District Court order involved Rules 6(e) [secrecy of proceedings and disclosure of grand jury]; 16(a)(3) [defendant's statements, reports of examinations and tests; defendant's grand jury testimony]; 16(b) [other books, papers, documents, tangible objects or places discoverable]; and 16(e) [protective orders with respect to discovery].

The opinion of the Court of Appeals for the Fifth Circuit attached to the Government's petition for certiorari shows that in *United States of America v. Gifford-Hill-American, Inc.,* the Government took a position with respect to review diametrically opposed to that taken in the case at bar. In fact both parties sought review by the Court of Appeals and the Court of Appeals was compelled to review the jurisdictional problem on its own motion. It considered *Will v. United States,* 389 U.S. 90, 19 L.Ed. 2d 305 (1967) and *Cobbledick v. United States,* 309 U.S. 323, 84 L.Ed. 783 (1940) and other cases and came to a conclusion the exact reverse of the Ninth Circuit in this case.

But the petition of the Government in *Gifford-Hill-American* is but one phase of a constitutional grand jury problem which has been growing for some sixty years and which has never been settled by this Court. If this Court reviews only *United States of America v. Gifford-Hill-American, supra,* it will review but a portion of the entire constitutional and statutory grand jury problem. If certiorari is granted in this case and the two are heard together, the Court will get a complete picture of the problem of constitutional limitations as they are applied to the grand jury and the problem of the Federal Rules of Criminal Procedure applicable under the circumstances. When the case at bar is added to the *Gifford-Hill-American* case, it will be seen that there is a Government policy which effectively converts the grand jury to an agency which is a mere dependent adjunct of the Department of Justice by (1) first issuing omnibus unconstitutional subpoenas without the knowledge of the grand jury to evade the search and seizure limitations on warrants [*Aguilar v. Texas, supra*] and on administrative summons and subpoenas [*See v. Seattle, supra; Camara v. Municipal Court, supra*]; (2) then using this information supposedly as a grand jury investigation but in fact as a means of turning the information searched and seized unlawfully over to the very Government agency to whom it would be denied otherwise [*In re April 1956 Term Grand Jury,* 239 F.2d 363 (CCA 7); *United States v. Culver,* 224 F.Supp. 419 (DC Md.)]) (3) by then having agents of the administrative department report to the grand jury after "winnowing" and copying only those matters which the agents believe the grand jury should know; (4) by then delivering all of

the transcripts and information to the United States Attorney's Office; (5) and then as to any person indicted claiming that no discovery may be had under Rule 16 since all of the information was simply found in grand jury transcripts and evidence and hence, the defendant could show no particularized need [See Petition of United States in *United States v. Gifford-Hill-American, Inc., et al.*]. This method of abusing the grand jury effectively accomplishes the following:

(a) It makes possible the evasion of constitutional limitations on searches and seizures and permits an intrusion not permitted by the Constitution or by the decisions of this Court.

(b) It makes possible the abuse of the subpoena power by claiming the subpoena to be that of a grand jury when in truth and in fact no grand jury ever considered the matter or even determined that it would be of any interest to the grand jury.

(c) It destroys the protective function of the grand jury guaranteed by the Constitution and makes it a mere "discovery device" in the hands of the public prosecutor, which discovery device is denied to the defendant.

(d) It results in the grand jury being completely controlled by reason of the fact that the supposed "grand jury evidence" procured by the unlawful search and seizure has been examined by special agents of the Internal Revenue Service (or any other agency of the Government) but the grand jury is permitted to know only those parts of the supposed contents of the books and records that the agent wants the jury to know.

(e) By this means, the "report" of the agent is not (1) under oath, and (2) the evidence favorable to the defendant or prospective defendant is suppressed without the knowledge of defendant or prospective defendant, contrary to *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194 (1963).

(f) By this means, the public prosecutor can guarantee an indictment based on his determination, not on the determination of the grand jury.

(g) The entire proceedings are then claimed to be secret with no particularized need of the defendant indicted being shown to examine the proceedings, and the prosecutor then places himself in a position to impeach defense witnesses, to put them in fear of contradiction since they cannot review or read the grand jury transcript in advance, and finally, to tailor the case so that the constitutional protections insisted upon by the courts may be defeated.

V.

Statement.

A. The Initial District Court Proceedings.

The facts of this case start in September of 1967 when Mr. Frank Andy, a special agent of the Internal Revenue Service (hereafter "IRS") appeared at Thriftimart and asked to examine the books, records and papers of Thriftimart for the fiscal years ended March 31, 1962, March 30, 1963, March 28, 1964, March 27, 1965, and March 26, 1966. Mr. Andy was refused because he declined to make a statement of purpose and limiting statement of the books, records, papers and documents he wished to examine. Whereupon, on May

21, 1968, Mr. Andy served an administrative summons prepared by him upon Thriftimart, Inc., and Roger M. Laverty, Sr., then its President and Chief Executive Officer. A response was prepared for Thriftimart and Mr. Laverty, Sr. The response refused the summons for reasons including the refusal of the special agent to state his purpose and to specify the papers and documents. The response went into considerable detail and also pointed out, among other things, that the investigation was a re-examination for a purpose that was not legitimate under *Reisman v. Caplin,* 375 U.S. 440, 449, 84 S.Ct. 508, 513 (1964), and other cases.

Thereafter, the IRS, with the cooperation of the Attorney General, sought to have the same special agent examine Thriftimart's books, records and papers under the guise of a subpoena duces tecum returnable to the grand jury. The subpoena duces tecum was served on Lampman and Thriftimart August 9, 1968, and required an appearance before the grand jury August 19, 1968.

Mr. Andy informed counsel for petitioners that he did not claim that there had been a fraud against the Revenue of the United States. His purpose was to see whether or not he could find any crime or crimes which might have been committed. According to the Government the Grand Jury would not see or examine the books and records involved here. They would be examined by special agents of the Internal Revenue Service, who would then "report" to the Grand Jury what they, the special agents, thought the Grand Jury ought to know.

The Attorney General refused any extension of time by agreement, and Lampman and Thriftimart then filed

a motion in the United States District Court for the Central District of California for the purpose of obtaining sufficient time to file a motion to quash the subpoena and to support it with necessary supporting evidence or to forthwith quash the subpoena. Respondent Court summarily denied the motion [Appendix A, page 1].

Whereupon, Lampman and Thriftimart filed their petition for Writ of Prohibition or Mandate in the Court of Appeals for the Ninth Circuit.

Two similar cases involving subpoenas issued by the Attorney General and motions to quash on the part of the citizens involved came on for hearing before the District Court. In those cases appeals were taken.

B. Initial Proceedings in Court of Appeals.

Upon the filing of the petition for writ of Lampman and Thriftimart, the Court of Appeals issued a stay. The stay is still in effect and, as a result, the subpoena has not been enforced.

After a hearing before Honorable Stanley Barnes and Honorable Walter Ely, Circuit Judges, a written order [Appendix B, page 2] was made by the Court of Appeals further staying the subpoena in this case and in two other cases appealed about the same time. The order provided that Respondent ". . . is authorized to conduct any further hearings which, upon any motion of the petitioners, it [Respondent Court] may choose to conduct and which may tend to afford the Court of Appeals a more complete record upon which to rest its disposition of the pending motions."

C. Further Proceedings in District Court.

Immediately upon the making of this order, Lampman and Thriftimart moved Respondent Court that Lampman and Thriftimart be permitted to prepare, file and serve a motion to quash the subpoena, and that the Court permit the preparation of an additional record as suggested by the order of the Court of Appeals. The motion to file a formal motion to quash subpoena duces tecum was granted by Respondent Court, but the District Court ordered that no depositions be taken [Appendix C, page 8]. This made impossible the production of evidence.

On February 26, 1969, the District Court made its order [Appendix D, page 11] denying the motion to quash and directing that the moving papers and opposition thereto be transmitted to the Court of Appeals in accordance with the Order of the Court of Appeals [Appendix B].

D. Final Proceedings in the Court of Appeals.

After the District Court refused to permit the making of a record as recommended by the Court of Appeals and denied the motions to quash, the record was certified to the Court of Appeals in accordance with its instructions, briefed by all parties and orally argued. It will be observed that the initial order of the Court of Appeals assumed jurisdiction [Appendix B].

Although the proceedings in the Court of Appeals commenced by Lampman and Thriftimart were commenced by petition for writ of prohibition or mandate, the proceedings of the other parties in the other cases, Lewis and Bolker, were brought to the Court on a notice of appeal. The Court of Appeals made no distinc-

tion between these methods of review by its order of September 10, 1968 [Appendix B]. In fact, no particular point was made of this except that the Government in its brief claimed that the case was not reviewable on petition for writ of prohibition or mandate and cited *Cobbledick v. United States,* 309 U.S. 323, and *Will v. United States,* 389 U.S. 90. At no time did it mention that at approximately the same time it was urging the Court of Appeals for the Fifth Circuit to accept jurisdiction on the basis of a petition for writ of mandate in a comparable case.

At the oral argument, no point was made concerning jurisdiction and it was assumed that the Court would review and make a determination upon the merits. To the surprise of these petitioners, the Court of Appeals rejected its own decision in *Continental Oil v. United States,* 330 F.2d 347 (CCA 9, 1964) which held that the Court had jurisdiction either by mandate or by appeal to review an order denying a motion to quash a subpoena duces tecum supposedly returnable to the grand jury and held that the Court had no jurisdiction under *Cobbledick v. United States, supra,* and *Will v. United States, supra,* to hear or consider the case [Appendix E, page 14]. The result of this opinion is that the motion to quash having been denied, these petitioners have no other remedy than by this petition for writ of certiorari to this Court to prevent the destruction of their constitutional rights against unlawful searches and seizures and their constitutional right to a valid and lawful grand jury.

VI.

Reasons for Granting the Writ.

A. Summary Statement of Reasons.

We agree with the Government in its petition for writ which was granted December 15, 1969, in *United States of America et al. v. Gifford-Hill-American, Inc., et al.* that the questions presented with respect to the integrity and constitutional efficacy of the grand jury represent serious and extraordinarily important questions which require the determination of this Court. The matter cannot be confined to so neat and narrow a slot as is suggested by the Government in that case. It apparently would like a decision based solely upon the interpretation of Rules 6 and 16 of the Federal Rules of Criminal Procedure. But that cannot be done without an inquiry into the constitutional organization and function of the grand jury. In addition, our case includes problems with respect to which the various courts of appeals are at odds and their opinions present to the district courts and to the lawyer attempting to advise business organizations a hopeless confusion which can only be resolved by this Court. We state the matter in outline form here:

1. The courts of appeals are in confusion and have rendered inconsistent opinions with respect to jurisdiction to review district court determinations pertaining to subpoenas duces tecum, indictments and discovery matters relating to the grand jury.

2. The courts of appeals are in confusion and have rendered inconsistent opinions with respect to searches and seizures initiated by the Department of Justice and by other agencies.

3. The cases are in confusion from the district court level to the Supreme Court level as to the function, limitation and constitutional position of the grand jury.

4. All of the foregoing constitute important and serious questions of law which must be decided in order to prevent this confusion and consequent flouting of the Constitution.

B. Confusion Over Judicial Review.

The problem of judicial review of interlocutory orders in cases involving businessmen, business regulation and like matters seems to create confusion among the various courts of appeals. Thus there is conflict between opinions within the Ninth Circuit. There is conflict between the Fifth Circuit and the Ninth Circuit. The conflict seems to revolve around the opinions of this Court in *Cobbledick v. United States,* 309 U.S. 323 (1940) and *Will v. United States,* 389 U.S. 97 (1967).

In *Continental Oil Co. v. United States,* 330 F.2d 347 (CCA 9, 1964) the Court of Appeals for the Ninth Circuit was asked to review an order of the trial court refusing to quash a subpoena duces tecum returnable to a grand jury. In that case, although *Cobbledick v. United States, supra,* was argued *in extenso,* the Court correctly held that *Cobbledick* did not apply to that case and that the subpoena should be quashed. The Court of Appeals for the Ninth Circuit went further and stated that review could be had either by prerogative writ or by appeal. This would seem to be precisely the holding of *Cobbledick* and *Will* where a constitutional issue is raised and the decision would in fact become final unless reviewed. This also con-

forms to the doctrine of this Court that the refusal to obey a subpoena duces tecum and the consequent conviction for contempt which would make the question of the subpoena duces tecum final and appealable is not a satisfactory alternative to a motion to quash. [*See v. Seattle, supra.*] Also, in the Federal Rules of Criminal Procedure, there is specific provision made for motions to quash subpoenas [Rule 17 (c)]. It would seem that this raises an absolute necessity for right of review in some form in the Court of Appeals.

The judgment here [Appendix E] is also contrary to the opinion in *United States v. Gifford-Hill-American, supra.*

See also:

Sanders v. Russell, 401 F.2d 241 (CCA 5, 1960);

In re Watkins, 271 F.2d 771 (CCA 5, 1959);

In re United States, 348 F.2d 624 (CCA 1, 1965);

United States v. Bondy, 171 F.2d 642 (CCA 2, 1948);

LaBuy v. Howes Leather Co., 352 U.S. 249, 259-60, 1 L.Ed. 2d 290, 299 (1957);

Schlagenhauf v. Holder, 379 U.S. 104, 13 L.Ed. 2d 152 (1964).

C. Confusion Among the Courts of Appeals Exists With Respect to Searches and Seizures on Business Property.

In 1967 this Court decided *Camara v. Municipal Court* and *See v. Seattle*. In these cases the Court specifically held that businesses and businessmen were entitled to protection under the Fourth Amendment against unreasonable searches and seizures and ex-

pressly overruled *Frank v. Maryland*, 359 U.S. 360, 79 S.Ct. 804 (1959), which had held to the contrary. In deciding *See v. Seattle* the Court expressly held that the Fourth Amendment requires that a subpoena to a business house must be sufficiently limited in scope, relevant in purpose and specific in directive that compliance will not be unreasonably burdensome. It also held that the Fourth Amendment requires that any inspection or subpoena must delimit the confines of the search by designating the needed documents in a formal subpoena.

A subpoena duces tecum is no different than a warrant, and the same requirements must be imposed on subpoenas duces tecum as are imposed on warrants.

Schwimmer v. United States, 323 F.2d 855, 860 (CCA 8, 1956);

Boyd v. United States, 116 U.S. 616, 622, 6 S.Ct. 524, 29 L.Ed. 746.

The courts of appeals seem to find it difficult to apply the Constitution to businesses and businessmen in accordance with the doctrine of the Court. Doubts are raised concerning consent and other factors which in a case involving a crime of violence would not trouble the courts. The result has been confusion among the courts of appeals and we find them going in various directions.

Apparently in order to eliminate the effectiveness of the Fourth Amendment, the Government has concluded that it can simply issue its own subpoenas, under the pretext that they are grand jury subpoenas, and by so doing, all of the rules required of administrative subpoenas and summons and warrants are eliminated. That is exactly what was done here.

In the following cases courts of appeals have forbidden warrantless searches and seizures of business property:

United States v. Stanack Sales Co., 387 F.2d 849 (CCA 3, 1968);

United States v. J. B. Kramer Grocery Co. [Not yet reported] (CCA 8, November 28, 1969);

Continental Oil Co. v. United States, 330 F.2d 347 (CCA 9, 1964);

Application of Certain Chinese etc., 19 F.R.D. 97 (USDC Cal., 1956);

Knoll Associates v. F.T.C., 397 F.2d 530 (CCA 7, 1968).

United States v. Dickerson, 413 F.2d 1111 (CCA 7, 1969);

United States v. Habig, 413 F.2d 1108 (CCA 7, 1969);

United States v. Sheba Bracelets, Inc., 248 F. 2d 134 (CCA 2, 1957);

On the other hand, the courts of appeals have refused to protect against searches and seizures on business property in the following cases:

United States v. Hammond Milling Co., 413 F.2d 608 (CCA 5, 1969);

Spahr and Kaiser v. United States, 409 F.2d 1303 (CCA 9, 1969);

Dean Rubber Manufacturing Company v. United States, 356 F.2d 161 (CCA 8, 1966);

In re April 1956 Term Grand Jury, 239 F.2d 263 (CCA 7, 1957);

Colonnade Catering Corporation v. United States, 410 F.2d 197 (CCA 2, 1969).

D. Confusion Exists With Respect to the Federal Grand Jury.

The grand jury is established by the Constitution. The Fifth Amendment to the Constitution provides *inter alia:*

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . ."

Rule 6, Federal Rules of Criminal Procedure, (see appendix G) establishes in rule form some but not all of the constitutional limitations necessary to the functioning of the grand jury in the manner contemplated by the Constitution.

At the adoption of the Constitution, the grand jury had two well-defined and established functions. Both functions required and still require that the grand jury be completely independent and subject only to limited control by the courts. No outside force, particularly agents and police officers such as special agents, prosecuting attorneys and others, can be permitted to destroy that independence.

One of these two established functions of the grand jury was the protection of witnesses, citizens and persons in their constitutional rights against the government. The primary function of the grand jury was not inquisitorial. The great interest of the founding fathers and draftsmen of the Constitution was not in the inquisitorial aspects of the grand jury but in its protective aspects.

2 *Pollock & Mailand, History of English Law,* 642 *et seq.;*

1 *Holdsworth, History of English Law,* 321 *et seq.;*

Rex v. Shaftsbury [1681] 8th Howell's State Trials, 759;

Edwards, The Grand Jury, page 31;

Stephen College's Case, Edwards, The Grand Jury, Pages 28 and 29;

Charge of Mr. Justice Field, The Grand Jury, San Francisco, 30 Fed. Cas. 18,255, pages 992, 994 and 995 (1872);

United States v. Wells, 163 F. 313, 327, 329 (USDC Idaho, 1909);

Wood v. Georgia, 370 U.S. 375, 390, 82 S.Ct. 1364 (1962).

This area of constitutional limitations is both neglected and important and deserves a determination by this court for the guidance of all courts.

See *Kuh, The Grand Jury Presentment: Foul Blow or Fair Play,* 55 Columbia Law Review, 1103 *et seq.* (1955);

The Grand Jury as an Investigatory Body, 74 Harvard Law Review 590 (1961);

Bartlett, Defendant's Right to an Unbiased Grand Jury, 47 Boston University Law Review 551 (1967).

In spite of the fact that the Constitution anticipates that a grand jury will be an independent protective tribunal, as well as an inquisitorial tribunal, this important constitutional function has not only been totally ignored over the past years but as we have pointed out, the Department of Justice has literally engaged in a program and policy to destroy it. The only function argued in recent cases for the grand jury is simply that of an investigating tool or adjunct of the prosecutor. In the pe-

tition of the solicitor general in *United States of America, et al. v. Gifford-Hill-American, Inc. et al.,* for writ of certiorari to the Fifth Circuit (granted December 15, 1969), the Court of Appeals' opinion attached to the petition as Appendix A, page 29, describes the grand jury ". . . as his [the prosecutors] own discovery device, with the subpoenaing of defense witnesses achieving much of the effect of a full-fledged deposition procedure."

In *United States v. Cleary,* 265 F.2d 459 (CCA 2, 1959), the grand jury is described as a "law enforcement agency" and an "investigative instrument of the prosecutor."

In *United States v. Morton Salt Company,* 216 F. Supp. 250 (USDC Minnesota, 1962), the court could see nothing wrong with the district attorney obtaining a subpoena to compel attendance before the grand jury when the grand jury was not even in session.

In re April 1956 Term Grand Jury, 239 F.2d 263 (CCA 7, 1956), a case relied on below by the Government, papers and records were subpoenaed by Government agents of the Internal Revenue Service who were then sworn as agents of the grand jury. They reported to the grand jury what they wanted it to know and yet the court held that this was a proper procedure. As we have indicated above in connection with the discussion of *United States v. Gifford-Hill-American, Inc.,* this means that the grand jury has been stripped of its independence; it is solely dependent upon the Department of Justice. The independence which it is supposed to have and which was guaranteed by the Constitution is gone. In order to control the grand jury

and determine that it will act as it is told to act, the agents of the Internal Revenue Service need only report what they want it to know and since it must act on their report, not on evidence, it could not exercise its protective function. The protective function of the grand jury has been destroyed by the doctrine of these cases.

It would seem that if the grand jury is nothing but an investigating tool, stripped of its protective function, then any subpoena issued for or on its behalf or by its master, the Department of Justice, must be limited and restricted just as any administrative summons or subpoena must be limited. In fact, such subpoenas duces tecum should be restricted in exactly the same fashion as warrants.

If on the other hand the grand jury is to be permitted to have independence and to re-assert its protective function and to become the master of the Department of Justice, not its slave, then subpoenas such as those here and in the case of *In re April 1956 Term Grand Jury*, 239 F.2d 263 (CCA 7, 1956), should be rejected by this court as inconsistent with the Constitution of the United States. In either event, subpoenas of the type here under consideration must be quashed.

In considering such subpoenas either the citizen is entitled to place an independent magistrate between himself and the prosecuting authority or he must be able to place an *independent grand jury* between himself and the prosecuting authority. The prosecuting authority cannot simply trample over the rights of citizens by converting the grand jury to its bounden slave and then issues its own subpoenas for whatever it may choose, thus evading the limitations, placed by the Constitution

upon the prosecuting authority and taking the supervision away from both the courts and the grand jury contemplated by the Constitution.

E. Important Questions of Law Are Presented.

This case not only presents the important questions raised by the confusion of the courts of appeals as set out above, it also raises important questions concerning the interpretation of Rules 6(a), 6(b), 6(d), and 6(e) with respect to grand juries and Rule 17(c) with respect to quashing subpoenas. The rules mentioned are attached as Appendix G.

This area of constitutional law is of great significance to every business, corporate or otherwise, to every labor union, and to every taxing and regulatory arm of government.

VII.

Conclusion.

We urge the Court to grant a writ of certiorari in this case.

Respectfully submitted,

WILLIAM J. CURRER, JR.,
Counsel for Petitioners.

APPENDIX A.

Copy of Minute Order.

"8/14/68 Counsel argue and the Motion to the Court on the issue of having a stay of time for the witness to appear before the grand jury or in the alternative having the subpoena duces tecum quashed. Court ords Motions denied. (JWC)."

APPENDIX B.

Order.

United States Court of Appeals, for the Ninth Circuit.

Owen B. Lampman, and Thriftimart, Inc., a California corporation, Petitioners, v. United States District Court, for the Central District of California, and Jesse W. Curtis, a Judge thereof, Respondents, United States of America, Real Party in Interest. No. 23173.

In The Matter of The Grand Jury Subpoena Duces Tecum Served Upon Gershon L. Lewis. No. 23177.

In The Matter of The Grand Jury Subpoena Duces Tecum Served Upon Joseph R. Bolker. No. 23178.

Before: BARNES and ELY, Circuit Judges.

While the background in these three matters is somewhat dissimilar, the identify of issues and requested relief justifies their combined treatment.

I. *No. 23173*

Owen B. Lampman is secretary of Thriftimart, Inc., hereinafter "Thriftimart." As such, he was served on Aug. 9, 1968, with a subpoena duces tecum, issued through the grand jury of respondent court, directing him to appear before the grand jury on Aug. 19, 1968, with extensive books and records of Thriftimart. Through counsel, petitioner learned that the subject of the grand jury's investigation was contributions to political campaigns and that the grand jury would not itself see the materials but would be informed of the contents of petitioners' records by special agents of the Internal Revenue Service acting as agents of the grand jury in their examination.

In September of 1967, the Internal Revenue Service had itself attempted to examina these documents. At that time the I.R.S. had stated its purpose as being a determination of whether or not any crime or crimes of any nature had been committed. Thriftimart's records had been audited and approved annually by the Service and those for 1962-1964 were, at the time of the summons, admittedly protected from another audit by the three year statute of limitations, unless fraud were charged, and no such claim was here made.

Thriftimart, citing both the Service's refusal to specify its purpose in the investigation and the statute of limitations, refused to produce the requested materials. In response, the Government served Thriftimart's president with an administrative summons on May 21, 1968, ordering his appearance with the previously requested records. Thriftimart again declined to produce the records and the Service took no action to enforce its summons. Petitioner's reaction to the grand jury subpoena was the filing with respondents of a motion containing three alternative orders. These were: 1) that the appearance date of the subpoena would be postponed one month to allow petitioners time to prepare a motion to quash the subpoena; or 2) that the court quash the subpoena and direct the Government to proceed through a formal motion for a subpoena duces tecum; or 3) that the subpoena be quashed.

Respondent denied the motion on Aug. 14, 1968, holding the subpoena to be adequate. Petitioners have now requested an order from this court that would: first, restrain all proceedings under the subpoena until after a hearing on a writ of mandamus to compel respondents to vacate the order and to provide petitioners

with an opportunity to file an adequate and appropriate motion to quash the subpoena; second, vacate the trial court's order that the subpoena was adequate; and third, order the trial court to postpone the subpoena's date for petitioner Lampman's appearance to allow time for a hearing pursuant to the requested writs.

II. *No. 23177*

Petitioner Gershon L. Lewis is vice-president and controller of Westdale Savings and Loan Association. On Aug. 7, 1968, he received a subpoena duces tecum from the grand jury acting in the related cases. This subpoena ordered him to appear on Aug. 20, 1968, and to present books and records of Westdale Savings and Loan Association for 1962-1966.

Petitioner had been served with a summons requesting similar books and records on Nov. 2, 1967. Contending that the summons raised constitutional questions then being litigated in the United States District Court for the Central District of California, petitioner requested that no action be taken on the summons until the pending proceedings were concluded. No subsequent enforcement action has been taken by the Service regarding the summons.

On Aug. 16, 1968, petitioner's motion to quash the subpoena was denied by the same District Court which had overruled similar motions by the petitioners, *supra*. That court also denied petitioner's motion for a one week stay pending appeal to this court. Petitioner now prays that this court grant a writ of mandamus or a writ of prohibition or, in the alternative, a stay pending appeal, which would excuse petitioner's

appearance before the grand jury until ordered by this court.

III. *No. 23178*

Petitioner Bolker, president of Wolpole Estates, Inc., was served with a subpoena duces tecum from the Grand Jury for the United States District Court for the Central District of California on Aug. 9, 1968. It directed him to appear on Aug. 20, 1968, with business records and books of Wolpole Estates, Inc. for the fiscal years 1962-1966.

These documents had previously been sought by the Internal Revenue Service; on Feb. 7, 1968, enforcement action was begun on a summons that had been made for them. Petitioner filed a counterclaim and application for a three-judge district court. After argument, the parties stipulated that further enforcement action on the summons would be held in abeyance and that matter continued until Oct. 1, 1968, or until a similar suit involving an application for a three-judge court, then on appeal in this court, was resolved.

On Aug. 15, 1968, petitioner filed a motion with the same court that had heard petitioner Lampman's application for time to file a motion to quash, *supra*. This motion sought a continuance of petitioner's appearance until Sept. 3, 1968, or until a time determined by the District Court judge sitting on the Government's enforcement proceedings for its summons. Petitioner stated that it was his intention to present that judge with a motion to quash the subpoena at this later date.

On Aug. 16, 1968, petitioner's motions to continue and to quash were denied, as was petitioner's sub-

sequent motion for a week's stay pending appeal to our court. Petitioner now seeks a writ of mandamus or a writ of prohibition or in the alternative, a stay pending appeal which would excuse the petitioner from appearing before the grand jury until a time determined by this court.

* * *

The petition in No. 23173 was presented to Judge Barnes, and at about the same time, the petitions in Numbers 23177 and 23178 were presented to Judge Ely. Judges Barnes and Ely conferred and determined that the two of them would act in cooperation in the determination of the three petitions, at least preliminarily. They invited informal oral argument on the part of the petitioners, of the respondent, and of the United States, and such oral presentation was made. The attorneys for the Government agreed that the times for the appearance by petitioners in response to the subpoenaes would be continued, pending the disposition of the petitions by the judges of this court.

Upon consideration, Judges Barnes and Ely have determined that each of the three petitions presents issues which should, according to the internal policy and practices of the court, properly be decided by a panel of three judges of the Court of Appeals, and, in line with such policy, Judges Barnes and Ely will summon a third judge to assist in the disposition of the three petitions. When the third judge has been designated, he, along with Judges Barnes and Ely, will decide if additional oral argument will be heard. Meanwhile, each of the parties will, within seven days from the date of this order, advise the court as to whether or not there is a desire to present oral argument before the three judges.

In aid of the jurisdiction of the Court of Appeals, it is directed that compliance with the subpoenaes questioned shall be stayed, until further order of this court.

Pending the final disposition of the three petitions, the District Court is authorized to conduct any further hearings which, upon any motion of the petitioners, it may choose to conduct and which may tend to afford the Court of Appeals a more complete record upon which to rest its disposition of the pending motions. If the petitioners renew their motions to the District Court, and if the District Court decides to conduct any hearing, then the petitioners will immediately notify the Clerk of the Court of Appeals to the end that the judges concerned will be apprised of the possibility of a supplementation of the record.

/s/ STANLEY W. BARNES
/s/ WALTER ELY
United States Circuit Judges

APPENDIX C.

Order Granting Petitioners' Motions to Make a More Complete Record on Appeal.

United States District Court, Central District of California.

In the Matter of the Subpoena Duces Tecum Directed to Owen B. Lampman, etc. No. 2001 Misc.

In the Matter of Grand Jury Subpoena Duces Tecum served upon Joseph R. Bolker, etc. No. 2005 Misc.

In the Matter of Grand Jury Subpoena Duces Tecum served upon Gershon L. Lewis. No. 2006 Misc.

Filed, Dec. 10, 1968.

The above entitled matters are presently on appeal. The Circuit Court of Appeals has specifically authorized this Court to "conduct any further hearings which, upon any motion of the petitioners, it may choose to conduct and which may tend to afford the Court of Appeals a more complete record upon which to rest its disposition of the pending motions." Such motions have been made and the matters have been submitted to the Court for its decision.

This Court previously heard and rendered judgment in the case of *United States v. Ahmanson*, 67-489-JWC, which is now on appeal. In the main, the same questions determined there have been raised in these proceedings. In the *Ahmanson* case the Court over strenuous objections of the Government gave the respondents wide discovery opportunities, which they pursued

most extensively, but which produced little of substance.

The present motions were filed shortly before the appearance date before the Grand Jury and at a time when all arrangements for such a hearing had been completed. This Court felt that these motions had as their only purpose the harassment of the Internal Revenue Service and a delay in the investigation. Since some of the attorneys in these proceedings were also involved in the *Ahmanson* case, the Court felt that they could have as easily and as expeditiously prepared motions to quash, with such showing as they were able to make, as the motions to continue, which were made. In fact, in open Court, counsel were unable to assure the Court that they had any new material to present in these matters beyond that already submitted in support of their contentions in the *Ahmanson* case.

It now appears, however, that further appearances of the movants before the Grand Jury have been stayed until some yet undetermined time in the future, and there is no longer any great need for urgency. This being so, there seems to be no reason why petitioners should not be permitted to augment the record before the Circuit Court of Appeals within reasonable limits.

IT IS THEREFORE ORDERED that all the moving parties may have until December 20, 1968, to file motions to quash upon such grounds as they may wish to set forth and may, within such time, file such affidavits in support thereof as they may desire. The

respondents shall have until the 10th of January, 1969, within which to file such opposition as they may wish. The movants, then, shall have until the 20th of January, 1968, to reply and the matter will be heard Monday, January 27, 1969.

IT IS FURTHER ORDERED that there shall be no depositions or other discovery unless specifically permitted by the Court.

DATED: December 9, 1968.

/s/ JESSE W. CURTIS
Jesse W. Curtis
United States District Judge

APPENDIX D.

Order.

United States District Court, Central District of California.

In the Matter of the Subpoena Duces Tecum directed to Owen B. Lampman, etc. Misc. No. 2001.

In the Matter of Grand Jury Subpoena Duces Tecum served upon Joseph R. Bolker, etc. Misc. No. 2005

In the Matter of Grand Jury Subpoena Duces Tecum served upon Gershon L. Lewis. Misc. No. 2006.

Filed, Feb. 26, 1969.

The above entitled matters are presently on appeal. By order filed September 10, 1968, the circuit court authorized this court "to conduct any further hearings which, upon any motion of the petitioners, it may choose to conduct and which may tend to afford the court of appeals a more complete record upon which to rest its disposition of the pending motions."

Thereafter, the petitioner in each case made a motion to make a more complete record. On December 9, 1968, this court determined that the petitioners should be permitted to augment the record within reasonable limits and provided that "the moving parties may have until December 20, 1968, to file motions to quash upon such grounds as they may wish to set forth and may, within such time, file such affidavits in support thereof as they may desire. The respondents shall have until the 10th of January, 1969, within which to file such opposition as they may wish. The movants, then, shall have until the 20th of January, 1969, to reply and the matter will be heard Monday, January 27,

1969. It is further ordered that there shall be no depositions or other discovery unless specifically permitted by the court."

Thereafter, in each of these matters renewal of the motion to quash the grand jury subpoena duces tecum was filed with supporting affidavit, and in each case the Government has filed its opposition thereto.

These papers present little, if anything, new but are mere repetitions and restatements of earlier arguments, all of which are presently before the circuit court of appeals. It appears to this court that petitioners' contentions are all matters of law and that each of these proceedings is in a posture suitable for consideration by the circuit court of appeals.

Petitioners have contended that they should have further discovery opportunities, but there has been no showing of any necessity therefor other than a desire on the part of the petitioners to interrogate agents and employees of the Internal Revenue Service in the hope of finding some evidence to support their contentions. About the only factual issue, if it be an issue, is the suggestion that the court should take judicial knowledge that in similar cases now pending upon appeal it has been "alleged" that agents of the Internal Revenue Service have been guilty of fraud. This court is familiar with one such case having heard it originally. In that proceeding generous discovery privileges were given petitioners in order that they might be permitted to find evidence in support of their allegations. What followed may best be characterized as an extensive "fishing expedition" which produced nothing of importance.

The attorneys for petitioners here have been unable to give this court any indication or assurance that further discovery in these proceedings will be any more fruitful or that they intend to explore any new sources of information. It appears, therefore, that the discovery requested would only harass the Internal Revenue Service and delay the proceedings.

The renewal motion to quash the subpoena duces tecum in each of the above entitled proceeding is, therefore, denied.

Petitioners' request for further discovery is likewise denied, and

IT IS FURTHER ORDERED that the record as it relates to the proceedings of this court, conducted under the authority and the order of the circuit of appeals, filed September 10, 1968, be forwarded to the clerk of the circuit court of appeals for its use in whatever manner it deems proper.

Dated: Feb. 26, 1969.

/s/ JESSE W. CURTIS
Jesse W. Curtis
United States District Judge

APPENDIX E.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Owen B. Lampman, and Thriftimart, Inc., a California corporation, Petitioners, vs. United States District Court for the Central District of California, and Jesse W. Curtis, a Judge thereof, Respondents. No. 23,173.

In the Matter of the Grand Jury Subpoena Duces Tecum Served upon Gershon L. Lewis, Gershon L. Lewis, Appellant, vs. United States of America, Appellee. No. 23,177.

In the Matter of the Grand Jury Subpoena Duces Tecum Served upon Joseph R. Bolker, President of Walpole Estates, Inc., Joseph R. Bolker, Appellant, vs. United States of America, Appellee. No. 23,178.

October 31, 1969

Appeal from the United States District Court for the Central District of California

Before: HAMLIN and DUNIWAY, Circuit Judges, and SMITH*, District Judge.

DUNIWAY, Circuit Judge:

These three cases were separately briefed but were argued together because they all present similar questions. In No. 23,173, petitioner Lampman seeks a writ directing the District Court to set aside an order deny-

*Honorable Russell E. Smith, United States District Judge, District of Montana, sitting by designation.

ing a motion to quash a subpoena, and to grant the motion to quash. Lampman has not appealed from the order denying his motion to quash. In Nos. 23,177 and 23,178, Lewis and Bolker have appealed from orders denying their motions to quash subpoenas.

In each case, the basic facts are similar. Each individual petitioner or appellant is an officer of a corporation. Each was served with a subpoena, directing him to appear before a Federal Grand Jury and to bring with him certain records of the corporation. Each corporation had previously been served with an administrative summons issued by the Internal Revenue Service (see 26 U.S.C. § 7602), and demanding the same records. Each had declined to comply. After various maneuvers, proceedings to enforce these summonses have not been pressed, and the District Court has denied motions to quash the Grand Jury subpoenas.

We conclude that the orders attacked are interlocutory, are not appealable, and are not such that we should seek to control the District Court's action under the All Writs Act (28 U.S.C. § 1651.) We therefore do not decide the questions that the parties seek to present.

1. *The orders are not appealable.*

In *Cobbledick v. United States*, 1940, 309 U.S. 323, the Court held that an order denying the motion of one subpoenaed to appear and produce documents before a Grand Jury to quash the subpoena is not a final appealable order. It affirmed a judgment of this court, dismissing such an appeal. No case cited to us indicates that *Cobbledick* is not still good law.[1]

[1] *Cobbledick* has been repeatedly cited by the Supreme Court in cases which follow the policy against piecemeal litigation on which

(This footnote is continued on the next page)

Our decision in *Continental Oil Co. v. United States*, 9 Cir., 1964, 330 F.2d 347, is not to the contrary. That case also concerned the denial of a motion to quash Grand Jury subpoenas. We order the subpoenas quashed. As to our jurisdiction, we said: (p. 349)

> "We have concluded that the appellants-petitioners are entitled to relief either by way of appeal, see *Perlman v. United States*, 247 U.S. 7, 38 S.Ct. 417, 62 L.Ed. 950, *Schwimmer v. United States*, 8 Cir., 232 F.2d 855, or by way of mandamus or prohibition, see *La Buy v. Howes Leather Co.*, 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed.2d 290, *Atlass v. Miner*, 7 Cir., 265 F.2d 312, *United States v. Cobb*, 9 Cir., 328 F.2d 115."

We did not decide which. And apparently *Cobbledick* was not called to our attention. We think that, in view of *Cobbledick*, we should treat *Continental Oil* as a case in which we granted relief under the All Writs Act.

2. *Relief under the All Writs Act is not appropriate here.*

Every consideration relating to piecemeal litigation and delay of Grand Jury proceedings on which the Supreme Court rested its decision in *Cobbledick* is equally applicable when we consider whether to exercise our jurisdiction under the All Writs Act. The Supreme Court so indicated in *Will v. United States*, 1967, 389

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it rests. *E.g., Will v. United States*, 1967, 389 U.S. 90, 96; *DiBella v. United States*, 1962, 369 U.S. 121, 124; *Parr v. United States*, 1956, 351 U.S. 513, 518. See also *Thornton v. Corcoran*, D.C.Cir., 1969, 407 F.2d 695, 697; *Stewart v. Bishop*, 8 Cir., 1968, 403 F.2d 674, 678.

U.S. 97-98. In *Will,* the Court cautions against use of the writ as a means of reviewing an interlocutory non-appealable order, especially in a criminal case. We are told to limit its use to exceptional cases amounting to judicial usurpation of power. And we can find no such circumstances here. Whether, in the light of *Will,* we would decide *Continental Oil* in the same way today, we need not decide.

In Nos. 23,177 and 23,178, the appeals are dismissed. In No. 23,173, the petition is denied.

APPENDIX F.

Order.

United States Court of Appeals, for the Ninth Circuit.

Owen B. Lampman and Thriftimart, Inc., a California corporation, Petitioners, vs. United States District Court for the General District of California, and Jesse W. Curtis, a Judge thereof, Respondents. No. 23,173.

In the Matter of the Grand Jury Subpoena Duces Tecum Served upon Gershon L. Lewis, Gershon L. Lewis, Appellant, vs. United States of America, Appellee. No. 23,177.

Filed, Dec. 2, 1969.

Before: HAMLIN and DUNIWAY, Circuit Judges, and SMITH, District Judge.

The opinion in these cases is modified by striking the sentence appearing at lines 8 and 9, page 3 of the slip opinion reading as follows: "And apparently *Cobbledick* was not called to our attention." and substituting the following sentence: "*Cobbledick* was called to our attention in that case but was not cited or discussed in the opinion."

The petitions for a rehearing filed on November 12 and 13 are denied.

No active judge of the court has voted to hear the matter in banc. The suggestion of a hearing in banc is rejected.

APPENDIX G.

"Rule 6. The Grand Jury

"(a) *Summoning Grand Juries.* The court shall order one or more grand juries to be summoned at such times as the public interest requires. The grand jury shall consist of not less than 16 nor more than 23 members. The court shall direct that a sufficient number of legally qualified persons be summoned to meet this requirement.

"(b) *Objections to Grand Jury and to Grand Jurors.*

"(1) *Challenges.* The attorney for the government or a defendant who has been held to answer in the district court may challenge the array of jurors on the ground that the grand jury was not selected, drawn or summoned in accordance with law, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court.

"(2) *Motion to Dismiss.* A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

* * *

"(d) *Who May Be Present.* Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

"(e) *Secrecy of Proceedings and Disclsoure.* Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.",

"Rule 17. Subpoena

* * *

"(c) *For Production of Documentary Evidence and of Objects.* A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein,

The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys."